No. 79-1082

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

and

TIDEWATER MOTOR TRUCK ASSOCIATION,
HOUFF TRANSFER, INC., and
DOLPHIN FORWARDING, INC.,
Respondents.

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION

and

NEW YORK SHIPPING ASSOCIATION AND
COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The District of Columbia Circuit

BRIEF OF RESPONDENT DOLPHIN FORWARDING, INC.

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OPINIONS BELOW

The opinion of the Court of Appeals (Cert. App. A at 1a-83a)[1] is not yet officially reported. The decisions and orders of the National Labor Relations Board (Cert. App. D and E at 90a-109a, 110a-184a) are reported at 231 N.L.R.B. 351 and 236 N.L.R.B. No. 42.

JURISDICTION

The judgment of the Court of Appeals (Cert. App. B at 84a-86a) was entered on September 25, 1979. The Board's petition for rehearing with a suggestion for rehearing *en banc* was denied on December 13, 1979 with Judges Tamm, MacKinnon, Robb and Wilkey dissenting (Cert. App. C at 87a-88a).[2] The petition for writ of certiorari was filed on January 10, 1980, and was granted on January 21, 1980. The jurisdiction of this Court is invoked under 29 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that contractual provisions adopted by the union and the employer-organizations to deal with containerization in the shipping industry enlarged, rather than preserved, work opportunities for employees represented by the union, and that such provisions therefore violated Section 8(e) of the National Labor Relations Act and that union action to enforce them violated Section 8(b)(4)(B) of the Act.

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[1] "Cert. App. A through E" citations are to the appendices in the petition for writ of certiorari of the National Labor Relations Board.

[2] By motion subsequent to the judgment of the Court of Appeals, Dolphin Forwarding, Inc. was granted leave to intervene and file a petition for rehearing which was also denied on December 13, 1979.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) are as follows:

1. Section 8(b), 29 U.S.C. § 158(b), provides, in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents
>
> (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:
>
> * * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * Provided, that nothing contained in this clause (B) shall be construed to make unlawful * * * any primary strike, or primary picketing; * * *

2. Section 8(e), 29 U.S.C. § 158(e), provides, in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void * * *

ARGUMENT

THE COURT OF APPEALS FAILED TO GIVE PROPER CONSIDERATION TO THE "SURROUNDING CIRCUMSTANCES" AS MANDATED IN NATIONAL WOODWORK AND PIPEFITTERS

Respondent Dolphin Forwarding, Inc. ("Dolphin") consolidates small packages and shipments of goods for ocean transport between the northeastern United States and Puerto Rico. Goods are collected at warehouses utilized by Dolphin, located at off-pier sites within a fifty-mile radius of the Port, and are loaded into (or unloaded from) containers supplied to Dolphin by the ocean shipping carriers. Ever since Dolphin started in business, the work of loading and unloading these containers has been performed by non-International Longshoremen's Association ("ILA") labor (indeed, since the ILA's activities are limited to the pier, the ILA could not perform this work in any event).

Beginning in late 1974, pursuant to a 1969 Agreement extracted from them by the ILA (known as the Rules on Containers), the ocean carriers, through their bargaining agent New York Shipping Association ("NYSA"), have been threatening to put an end to Dolphin's business by refusing to supply or carry containers loaded or unloaded at Dolphin's off-pier facility. If the Court sanctions this takeover of an entire industry by the ILA and NYSA, Dolphin and companies like it will face economic extinction.

According to previous decisions of this Court, the ILA-NYSA agreement is lawful only if it was intended to "preserve" work traditionally performed by the ILA. The test for assessing the validity of a "work preservation" clause was enunciated by this Court in *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612 (1967) and *Enterprise Ass'n of Steam, etc. Pipefitters* v. *NLRB*, 429

U.S. 507 (1977). In making such an analysis, *National Woodwork* requires consideration by the National Labor Relations Board ("Board"), in the exercise of its administrative discretion, of "all the surrounding circumstances"[3] relating to the work in question. Such factors as the economic "personality" and history of the industry, the threat of displacement of workers and the history of labor relations between the union and the employers being boycotted are to be considered in performing this analysis.[4]

In the instant case, the Court of Appeals recognized the controlling nature of the *National Woodwork* and *Pipefitters* precedents but, it is submitted, ignored the type of "surrounding circumstances" analysis that those cases expressly require. *International Longshoremen's Ass'n* v. *NLRB*, Nos. 77-1735, 77-1758, and 78-1510 (D.C. Cir. filed Sept. 25, 1979).[5]

The first order of business in analyzing a "work preservation" issue is to define the work in controversy "since that is the predicate upon which the issue of work preservation must turn." *International Longshoremen's Ass'n*, 221 N.L.R.B. 956, 959 (1975). In rendering its decisions, the Board concluded that the off-pier "stripping" (unloading) and "stuffing" (loading) of containers

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[3] *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 644 (1967).

[4] *Id.* at 644 n.38.

[5] Two separate Board proceedings, *International Longshoremen's Ass'n. (Associated Transport, Inc.)*, 231 N.L.R.B. 351 (1977) and *International Longshoremen's Ass'n. and New York Shipping Ass'n, Inc. (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. No. 42 (1978), were consolidated for argument and decision by the Court of Appeals. The *Dolphin Forwarding* case involves the Port of New York; the *Associated Transport* case involves the Ports of Baltimore, Maryland, and Hampton Roads, Virginia.

was the appropriate definition of the work in question.[6] The Court of Appeals rejected this definition and held that the Board had "committed reversible legal error by ignoring circumstances crucial to responsible application of the Supreme Court's work preservation doctrine enunciated in *National Woodwork* and *Pipefitters.*" (Cert. App. A at 50a-51a). The Court of Appeals offered no definition of its own but indicated that the "loading and unloading of ocean-borne cargo" was a definition that would have been acceptable to it (Cert. App. A at 51a).

A review of the development and spread of containerization clearly evidences the erroneous nature of the Court of Appeal's conclusion. This history indicates that the Court, and not the Board, "ignored circumstances" in rendering its decision.

The present-day concept of the consolidation of cargo into large wooden or metal boxes was originated in the early 1920's when the Illinois Central Railroad began offering a container service for the handling of small packages which were to be shipped by rail.[7] The use of such containers, many of which were not larger than eight-foot cubes, expanded in the 1930's and 1940's to the extent that numerous railroad companies were utilizing containers for rail service.

In 1932, the Department of Labor conducted an in-depth study of the problems of ocean cargo handling and strongly suggested that a solution to the low productivity levels being experienced in such handling would be the

[6] *See* Cert. App. D at 95a; Cert. App. E at 116a. *See also International Longshoremen's Ass'n*, 221 N.L.R.B. 956 (1975); *International Longshoremen's Ass'n*, 245 N.L.R.B. 172 (1979).

[7] *See* 1967 First Annual Pacific Institute of Transportation No. 1—The Containerization Explosion at 87. *See also* O. BARTHOLOMEW, MECHANICAL LOADING OF CARGO VESSELS 10 (1942).

utilization of large uniform-sized containers for ocean shipment.[8]

The concept of a fully containerized ocean going vessel was first developed in the early 1940's when Mr. L. D. Smith applied for patent rights on a ship's hold allowing for the rapid loading and discharge of containers.[9] Mr. Smith concluded that such a method of cargo-handling would greatly reduce pilferage and damage rates[10] while substantially improving productivity on the piers.

Throughout the course of World War II, the use of so-called "Conex" boxes by the military became widespread. They were owned by the United States and were loaded by government employees with household goods, electronic equipment, *etc.* These boxes were never stripped or stuffed by ILA labor.[11]

Prior to World War II, personal property was shipped to the United States in large wooden boxes which were roughly the size of a household moving van (Jt. App. 602-603).[12] These boxes were not stripped or stuffed by ILA labor (Jt. App. 603). Subsequent to World War II, immigrants from Puerto Rico utilized the same type of container for transport of personal property without having to

[8] U.S. BUREAU of LABOR STATISTICS, DEP'T of LABOR, BULL. NO. 550, CARGO HANDLING AND LONGSHORE LABOR CONDITIONS 16 (1932).

[9] *See* C. SAUERBIER, MARINE CARGO OPERATIONS 54 (1944) ("SAUERBIER").

[10] *Id.* The reduction in pilferage and damage has uniformly been cited as a significant advantage of off-pier consolidation. *See, e.g., Agreement No. 10294*, Dec. Fed. Mar. Comm'n No. 77-23 at 48 (Dec. 13, 1979).

[11] *See Humphrey* v. *International Longshoremen's Ass'n.*, 548 F.2d 494, 498 n.16 (4th Cir. 1977).

[12] "Jt. App." citations are to the Joint Appendix filed in this case. The size of containers presently utilized by consolidators and ocean carriers is typically 40 feet in length by 8 feet in height or roughly the size of a household moving van.

undergo any on-pier stripping or stuffing by ILA labor (Jt. App. 603).

In 1949, Valencia-Baxt Express, Inc., one of the first off-pier consolidators, was organized and commenced offering regular container shipping services.[13] At first, Valencia-Baxt utilized eight (8) foot containers[14] which were loaded by its non-ILA employees at an off-pier site. In 1955, Valencia-Baxt began using twenty (20) foot containers,[15] some of which are still in use today. Valencia-Baxt and its successor, Consolidated Express, Inc.,[16] did not experience on-pier stripping and stuffing of their containers by the ILA, with few exceptions, until February of 1973.[17]

The Sea-Land Company pioneered the total containership concept commencing in 1956 when it began offering service between the ports of New York and Houston.[18]

[13] *See Balicer* v. *International Longshoremen's Ass'n.*, 364 F. Supp. 205, 220-221 (D.N.J. 1973).

[14] *Id.* at 221.

[15] *Id.*

[16] 364 F. Supp. at 208 n.2. Consolidated Express, Inc. filed unfair labor practice charges against the ILA and the NYSA shortly after its containers were first stripped and stuffed in the spring of 1973. *See International Longshoremen's Ass'n*, 221 N.L.R.B. 956 (1975) ("Conex I"). The Board found that the appropriate work in controversy was the off-pier loading of containers, an activity to which the Board found the ILA had no legitimate claim and which constituted "make-work" or featherbedding for the ILA. *Id.* at 960. The cease-and-desist order of the Board entered by the Board in *Conex I* was enforced by the United States Circuit Court of Appeals for the Second Circuit. *See International Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). In *Dolphin*, the Board held that the *Conex I* precedent was controlling and entered a cease-and-desist order which was denied enforcement by the Court of Appeals below.

[17] *Id.* at 221. *See also* Jt. App. 632.

[18] *See Hearings Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. 127 (1967) ("*Marine Hearings*").

At the same time the United States was in the process of selling two war-built tankers to a Great Lakes shipping line which were to be converted into containerships for use in trade from New York to Mexico and Cuba.[19] It was reported in 1956 that A.H. Bull and Co. was moving between five and six hundred containers per year[20] in the New York-Caribbean trade.

In recognition of the enormous potential for containerization and the expanded use of containerships, in 1956 the Port of New York Authority acquired a 300-acre tract of meadowland along Newark Bay in Elizabeth, New Jersey and initiated construction on an entirely new marine terminal designed to accomodate the containerships.[21]

In 1959, the ILA, which had been certified as the exclusive bargaining agent for longshoremen in the Port of New York in 1956,[22] at first signed a collective bargaining agreement with the NYSA which permitted the free and unfettered use of containers.[23] This provision remained intact until the longshore negotiations of 1968. During that entire period, containerization played vir-

[19] *See Hearings on S.J. Res. 177 Before the Subcomm. of the Senate Comm. on Interstate and Foreign Comm.*, 84th Cong., 2d Sess. (July 3, 1956).

[20] SAUERBIER at 411.

[21] PORT OF NEW YORK AUTHORITY, CONTAINER SHIPPING: FULL SPEED AHEAD (May, 1967).

[22] *See Matter of New York Shipping Ass'n*, 116 N.L.R.B. 1183 (1956).

[23] Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 Lab. L.J. 397, 401 (1970).

tually no role in the periodic negotiations between the ILA and NYSA[24] while it experienced substantial widespread diffusion throughout the shipping industry.

In 1964, Dolphin commenced offering consolidation services for container shipments between the Port of New York and Puerto Rico and did not have its containers interfered with by ILA labor until December of 1974 (Jt. App. 586-587). Dolphin principally utilized the Seatrain shipping line as its primary carrier (Jt. App. 477, 493), although Sea-Land possessed a greater container capacity. By 1967, Sea-Land operated 25 containerships, many of which were capable of carrying the larger 20-foot containers,[25] with four vessels in shipyards for delivery the following year.[26] More particularly, Sea-Land owned or leased over 31,000 containers in 1967.[27]

It was not until twenty years after the first consolidator commenced offering container services that the ILA laid claim to the exclusive stripping and stuffing of containers.[28] This change of position in the 1968-1969 negotiations followed nearly ten years of adherence to the plain meaning of the 1959 Agreement which allowed for the free and unrestricted use of containers, *i.e.*, no on-pier stripping and stuffing by ILA labor.[29] A strike ensued,

[24] In 1964, after a lengthy strike, NYSA set up a guaranteed annual income ("G.A.I.") plan for longshoremen. Containerization was not at issue. The GAI plan gave longshoremen a guarantee of a minimum of 1600 work hours per year at longshore rates. This level was increased to 2080 in 1969. *See Agreement 10294*, Dec. Fed. Mar. Comm'n No. 77-23 at 60 (Dec. 13, 1979).

[25] *See Marine Hearings* at 127. *See also International Longshoremen's Ass'n* v. *NLRB*, 537 F.2d at 709 (2d Cir. 1976).

[26] *See Marine Hearings* at 127.

[27] *Id.* at 128. During the early 1960's, Sea-Land did not experience any stripping or stuffing of its containers by ILA labor (Jt. App. 632).

[28] *See International Longshoremen's Ass'n*, 221 N.L.R.B. at 957.

[29] *Id.* at 960.

following an inability to reach agreement between the ILA and the NYSA,[30] and a collective bargaining agreement was finally concluded.[31] The agreement, known as the Rules on Containers, provided that ILA labor would strip and stuff all containers which originated from within a fifty (50) mile radius of an ILA-port when loaded with less-than-container-load cargo ("LCL").[32] In the event a container was not so stripped and stuffed, the ocean carriers were required to pay a fee of $250 per container into a joint ILA-NYSA Container Royalty Fund which was used to supplement the G.A.I. payments.[33]

Despite its partial "success" in negotiating the Rules on Containers, the ILA did not choose, with a few exceptions, to strip or stuff containers consolidated at off-pier sites within a fifty mile radius of the Port of New York until four years after the execution of the Rules.[34] During that period, off-pier consolidators in the Port of New York were assured by the ocean carriers that their containers would not be "impeded" by ILA labor.[35]

In January 1973, again faced with the threat of a coast-wide strike by the ILA, the NYSA and the Council of North Atlantic Shipping Associations ("CONASA")

[30] *Id.* at 957-958.

[31] *Id.* at 958.

[32] This fifty mile limit was a substantial narrowing of the ILA's original claim to strip and stuff containers on-pier regardless of origin or type of cargo. Since a significant amount of consolidation of LCL cargo was done within such a radius, the Rules on Containers still presented a real danger to the continued existence of consolidators such as Dolphin.

[33] This fee was increased to $1,000 per container during the 1971 negotiations (Cert. App. A at 11a).

[34] *See, e.g., Balicer* v. *International Longshoremen's Ass'n.*, 364 F. Supp. at 217; *International Longshoremen's Ass'n*, 221 N.L.R.B. at 960.

[35] *See Balicer* v. *International Longshoremen's Ass'n*, 364 F. Supp. at 219.

reluctantly agreed to a supplement of the Rules of Containers, known as the Dublin Supplement, which required strict enforcement of the Rules.[36] The Dublin Supplement precluded the ocean carriers from providing containers to any off-pier consolidator, such as Dolphin, which was operating within the fifty-mile radius of the Port of New York.[37] Moreover, the Supplement contained a "runaway shop" clause which provided for extensions of the fifty-mile radius if a consolidator sought to "evade" the Rules on Containers by utilizing facilities beyond the fifty-mile radius (Cert. App. A at 66a).

Thus, it was not until February of 1973 that the ILA began a regular practice of stripping and stuffing containers[38] consolidated at off-pier sites, but no effort was made to enforce the Rules against Dolphin until December of 1974 (Jt. App. 586-587).

In light of the foregoing, any contention that the stripping or stuffing of containers is "traditional longshore work" simply cannnot withstand scrutiny. The economic history and "personality" of containerization clearly indicates that off-pier consolidators have been in continuous business since at least 1949 and that containers consolidated by these companies were not systematically stripped and stuffed by ILA labor until the Spring of 1973. A labor agreement which asserts an exclusive right to

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[36] *See International Longshoremen's Ass'n* v. *NLRB*, 537 F.2d at 710.

[37] *Id.*

[38] *See Balicer* v. *International Longshoremen's Ass'n.*, 86 L.R.R.M. 2559, 2563 (D.N.J. filed April 19, 1974); *International Longshoremen's Ass'n*, 221 N.L.R.B. at 960. A significant impact of the Dublin Supplement was a tremendous increase in pilferage and damage claims, both in number and dollar size, which was attributed to the increased handling of consolidated cargo by ILA labor. *See, e.g., Balicer* v. *International Longshoremen's Ass'n*, 86 L.R.R.M. at 2562.

perform work which has been historically and continuously performed by parties other than those to the agreement cannot pass muster under the test of "all the surrounding circumstances" test of *National Woodwork* and *Pipefitters*. A "work preservation" clause, such as the Rules on Containers, negotiated substantially after the advent and proliferation of containerization, should not be permitted to destroy the business of consolidators such as Dolphin.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the District of Columbia Circuit should be reversed and remanded for enforcement of the Board's order in the cases herein.

Respectfully submitted,

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